

NOS. PD-0018-22 and PD-0019-22

IN THE COURT OF CRIMINAL APPEALS

FOR THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
2/24/2022
DEANA WILLIAMSON, CLERK

**THE STATE OF TEXAS
PETITIONER**

VS.

**SEBASTIAN TORRES,
RESPONDENT**

**RESPONDENT'S REPLY TO STATE'S PETITION FOR
DISCRETIONARY REVIEW**

OF THE DECISIONS IN THE THIRTEENTH COURT OF APPEALS

CAUSE NOS. 13-20-00101-CR & 13-20-00102-CR

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THE RESPONDENT'S REPLY TO THE STATE'S PDR

Pursuant to Rule 68.9 of the Texas Rules of Appellate Procedure, the Respondent, by and through his attorneys, hereby replies to the State's petition for discretionary review.

I. The State's Failure to Make This Argument in the Trial Court Constitutes a Waiver of This Argument.

The State's argument should also be dismissed because this is the first time in the course of this case that the State has advanced this argument. The State did not make this argument in the trial court during the suppression hearing. Thus the trial court did not have an opportunity to hear this argument and rule on it. The consequence of the State's failure to make this argument in the trial court constitutes a waiver of this argument. The Court of Criminal Appeals has spoken clearly on this issue of waiver:

“Both Texas Rule of Appellate Procedure 33.1 and Texas Rule of Evidence 103 are ‘judge-protecting’ rules of error preservation. The basic principle of both rules is that of ‘party responsibility.’ Thus, the party complaining on appeal (whether it be the State or the defendant) about a trial court's admission, exclusion, or suppression of evidence ‘must, at the earliest opportunity, have done everything necessary to bring to the judge's attention the evidence rule [or statute] in question and its precise and proper application to the evidence in question.’ As this Court has stated:

We have previously recognized two general policies for requiring specific objections. ‘First, a specific objection is required to inform the trial judge of the basis of the objection and afford him the opportunity to rule on it. Second, a specific objection is required to afford opposing counsel an opportunity

to remove the objection or supply other testimony.’ Stated more broadly, objections promote the prevention and correction of errors. When valid objections are timely made and sustained, the parties may have a lawful trial. They, and the judicial system, are not burdened by appeal and retrial. When a party is excused from the requirement of objecting, the results are the opposite.

And so it is that appellate courts may uphold a trial court's ruling on any legal theory or basis applicable to the case, but usually may not reverse a trial court's ruling on any theory or basis that might have been applicable to the case, but was not raised. As this Court stated in *Mercado v. State*, under Rule 33.1, the issue is not whether the appealing party is the State or the defendant or whether the trial court's ruling is legally ‘correct’ in every sense, but whether the complaining party on appeal brought to the trial court's attention the very complaint that party is now making on appeal. This ‘raise it or waive it’ forfeiture rule applies equally to goose and gander, State and defendant.” Martinez v. State, 91 S.W.3d 331 at 335-336 (Tex.Cr.App. 2002). (footnotes omitted)

Because the State failed to make this argument in the trial court, it has been waived. The State’s Petition for Discretionary Review should be refused on this basis.

II. When the Magistrate Invoked This Procedure, He Used It.

In its petition for discretionary review, the State argues that because the magistrate initiated the procedure provided in Texas Family Code, Sec. 51.095(f) but that procedure was never completed, the procedure was not “used.” The State equates the phrase “uses the procedure” with “completing the procedure.”

Respondent would argue that it is clear that when the magistrate asked

that the Respondent be brought back to him after the Respondent gave his statement, it is clear that the magistrate intended to use the procedure set out in Sec. 51.095(f). The fact that the law enforcement authorities did not carry out their duties under Sec 51.095(f) does not negate the fact that it was the magistrate's intent to use the procedure and he did everything in his power to initiate and put that procedure into action.

As the State admits in its petition for discretionary review, the Court of Appeals construed the magistrate's action as "using" the procedure. The Court of Appeals' opinion as to what constitutes "using" the procedure is correct and is not a novel idea. In fact it was also espoused by the most renowned legal expert in Texas juvenile law, the late Professor Robert Dawson, when he wrote:

"The procedures outlined in Subsection (f) are not mandatory, but if a magistrate invokes them a judicial determination that the statement was given voluntarily must be made or else the statement will be inadmissible." Robert O. Dawson, Texas Juvenile Law 462 (8th ed. 2012) (emphasis added)

A clear reading of the statute shows that once the magistrate requests that the child be brought back to him, the remainder of Sec. 51.095(f) is mandatory. The fact that the State's own actors failed to follow the law does not negate the protections afforded a juvenile by the statute. That is not fair to the juvenile. The State's petition for discretionary review should be refused.

PRAYER FOR RELIEF

WHEREFORE, the Respondent respectfully requests that the Court
refuse the State's petition for discretionary review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply to the State's Petition for Discretionary
Review contains 1115 words, as calculated by the word count function on
my computer and is prepared in Times New Roman 14 point font.

/s/ Linda Icenhauer-Ramirez
LINDA ICENHAUER-RAMIREZ

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Reply to the State's Petition for Discretionary Review was e-served to the office of the State Prosecuting Attorney and e-served to Alexandria Lynn Barrera of the Starr County District Attorneys Office on this 18th day of February, 2022.

/s/ Linda Icenhauer-Ramirez
LINDA ICENHAUER-RAMIREZ

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